

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[E-Docket ID No. OAR-2003-0079, FRL- ]

RIN 2060-AJ99

Nonattainment Major New Source Review Implementation Under 8-Hour  
Ozone National Ambient Air Quality Standard: Reconsideration

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed Rule; Notice of public hearing.

**SUMMARY:** The EPA is requesting comment on issues raised in a petition for reconsideration of EPA's rule to implement the 8-hour ozone national ambient air quality standard (NAAQS or 8-hour standard). On April 30, 2004, EPA took final action on key elements of the program to implement the 8-hour standard. In that final action, we (the EPA) addressed certain implementation issues related to the 8-hour standard, including aspects of implementation of the nonattainment major New Source Review (NSR) program mandated by part D of title I of the Act (CAA or Act). See 69 FR 23951.

Following this action, on June 29, 2004 and September 24, 2004, three different parties each filed a petition for reconsideration concerning implementation of the 8-hour standard,

including both major NSR and other issues. By letter dated September 23, 2004, EPA granted reconsideration of three issues raised in the petition for reconsideration filed by Earthjustice on behalf of several environmental organizations. On February 3, 2005, we published a proposed rule providing additional information and soliciting comment on two of the issues on which we granted reconsideration. See 70 FR 5593. Today, we provide additional information and seek comment on the third issue, which relates to two aspects of the major NSR provisions in the April 30, 2004 final rules. Specifically, we request comment on whether we should interpret the Act to require areas to retain major NSR requirements that apply to certain 1-hour ozone nonattainment areas in implementing the 8-hour standard, and whether EPA properly concludes that a State's request to remove 1-hour major NSR programs from its State Implementation Plan (SIP) will not interfere with any applicable requirement within the meaning of Section 110(1) of the Act.

**DATES:** Comments. Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**

Public Hearing. The public hearing will convene at 9 a.m. and will end at 5 p.m. on **[INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION]**. All individuals who have registered to speak before the date of the public hearing will be given an

opportunity to speak. Because of the need to resolve the issues raised in this in a timely manner, EPA will not grant requests for extension of the public comment period. For additional information on the public hearing and requesting to speak, see the **SUPPLEMENTARY INFORMATION** section of this proposed rule.

**ADDRESSES:** Comments. Submit your comments, identified by Docket ID No. OAR-2003-0079, by one of the following methods to the docket. If possible, also send a copy of your comments to Ms. Lynn Hutchinson by either mail or e-mail as identified in the FOR FURTHER INFORMATION CONTACT section.

1. Federal eRulemaking Portal: <http://www.regulations.gov>.  
Follow the on-line instructions for submitting comments.
2. Agency Website: <http://www.epa.gov/edocket>. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
3. E-mail: [A-and-R-Docket@EPA.gov](mailto:A-and-R-Docket@EPA.gov). Attention E-Docket No. OAR-2003-0079.
4. Fax: The fax number of the Air Docket is (202) 566-1741.  
Attention E-Docket No. OAR-2003-0079.
5. Mail: Air Docket, Environmental Protection Agency,  
Attention E-Docket No. OAR-2003-0079, Mailcode: 6102T, 1200  
Pennsylvania Ave., NW., Washington, DC 20460. In addition,

please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

6. Hand Delivery: Air Docket, Attention E-Docket No. OAR-2003-0079, Room B-102, Environmental Protection Agency West, 1301 Constitution Avenue, NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to Docket ID No. OAR-2003-0079. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.epa.gov/edocket>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov websites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body

of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday,

excluding legal holidays. The Air and Radiation Docket telephone number is (202) 566-1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744 [non-NSR notice says 566-1741].

**FOR FURTHER INFORMATION CONTACT:** Ms. Lynn Hutchinson, Office of Air Quality Planning and Standards, (C339-03), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5795, fax number (919) 541-5509, e-mail: hutchinson.lynn@epa.gov.

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

A. Does this action apply to me?

Entities potentially affected by the subject rule for today's action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry Group	SIC <sup>a</sup>	NAICS <sup>b</sup>
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	324110
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188

Industrial Organic	286	325110, 325132, 325192,
Chemicals		325188, 325193, 325120,
		325199
Miscellaneous Chemical	289	325520, 325920, 325910,
Products		325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	486210, 221210
Pulp and Paper Mills	261	322110, 322121, 322122,
		322130
Paper Mills	262	322121, 322122
Automobile	371	336111, 336112, 336211,
Manufacturing		336992, 336322, 336312,
		336330, 336340, 336350,
		336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413,
		325414

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<sup>a</sup> Standard Industrial Classification

<sup>b</sup> North American Industry Classification System.

Entities potentially affected by the subject rule for today's action also include State, local, and Tribal governments that are delegated authority to implement these regulations.

B. What should I consider as I prepare my comments for EPA?

You may find the following suggestions helpful for preparing

your comments.

- Explain your views as clearly as possible.
- Describe any assumptions that you used.
- Provide any technical information and/or data you used that support your views.
- If you estimate potential burden or costs, explain how you arrived at your estimate.
- Provide specific examples to illustrate your concerns.
- Offer alternatives.
- Make sure to submit your comments by the comment period deadline identified.
- To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and Federal Register citation related to your comments.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of today's notice is also available on the World Wide Web. Following signature by the EPA Administrator, a copy of today's notice will be posted in the regulations and standards section of the New Source Review home page located at [www.epa.gov/nsr](http://www.epa.gov/nsr).



D. What information should I know about the public hearing?

The public hearing will be held at the EPA's facility at 109 TW Alexander Drive, Research Triangle Park, NC, or at an alternate facility nearby. Please check our website at <http://www.epa.gov/nsr/> for information and updates concerning the public hearing.

The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the issues raised in this notice. People interested in attending or presenting oral testimony are encouraged to register in advance by contacting Ms. Chandra Kennedy, OAQPS, Integrated Implementation Group, Information Transfer and Program Integration Division (C339-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number (919) 541-5319 or e-mail [kennedy.chandra@epa.gov](mailto:kennedy.chandra@epa.gov) no later than **[INSERT DATE 10 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Presentations will be limited to 5 minutes each. We will assign speaking times to speakers who make a timely request to speak at the hearing. We will notify speakers of their assigned times by **[INSERT DATE 12 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

We will attempt to accommodate all other people who wish to speak, as time allows.

The EPA's planned seating arrangement for the hearing is

theater style, with seating available on a first come first served basis for about 250 people. Attendees should note that the use of pickets or other signs will not be allowed on either government or hotel property.

As of the date of this announcement, the Agency intends to proceed with the hearing as announced; however, unforeseen circumstances may result in a postponement. Therefore, we advise members of the public who plan to attend the hearing to contact Ms. Chandra Kennedy at the above referenced address to confirm the location and date of the hearing. You may also check our New Source Review website at <http://www.epa.gov/nsr> for any changes in the date or location.

The record for this action will remain open until [**INSERT DATE 45 DAYS AFTER PUBLICATION DATE**] to accommodate submittal of information related to the public hearing.

E. How is this notice organized?

The information presented in this notice is organized as follows:

I. General Information

- A. Does this action apply to me?
- B. What should I consider as I prepare my comments for EPA?
- C. Where can I get a copy of this document and other related information?
- D. What information should I know about the public hearing?
- E. How is this notice organized?

## II. Background

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### VII. Statutory Authority

## **II. Background**

On July 18, 1997, we revised and strengthened the ozone

NAAQS to change from a standard measured over a 1-hour period (1-hour standard) to a standard measured over an 8-hour period (8-hour standard). Previously, the 1 hour standard was 0.12 ppm. We established the new 8-hour standard at 0.08 ppm. See 62 FR 38856. Following revision of the standard, we promulgated an implementation rule that provided for implementation of the 8-hour standard under the general nonattainment area provisions of Subpart 1 of Part D of the Act. See 62 FR 38421. Subsequently, the Supreme Court ruled that our implementation approach was unreasonable because we did not provide a role for the generally more stringent ozone specific provisions of Subpart 2 of Part D of the Act in implementing the 8-hour standard. See Whitman v. Amer. Trucking Assoc., 531 U.S. 457, 471-476, 121 S.Ct. 903, 911-914 (2001). The Court remanded the implementation strategy to EPA to develop a reasonable approach for implementation. Id. Accordingly, on June 2, 2003 (68 FR 32802), we proposed various options for transitioning from the 1-hour to the 8-hour standard, and for how the 8-hour standard would be implemented under both subpart 1 and subpart 2. On August 6, 2003 (68 FR 46536), we published a notice of availability of draft regulatory text to implement the 8-hour standard. Among other things, this proposed rule included certain provisions for implementing major NSR. Specifically, we proposed that major NSR would generally be

implemented in accordance with an area's 8-hour ozone nonattainment classification, but we would provide an exception for areas that were designated nonattainment for the 1-hour standard at the time of designation for the 8-hour standard. If the classification for a 1-hour nonattainment area is higher than its classification under the 8-hour standard, then under the proposed rule, the major NSR requirements in effect for the 1-hour standard would have continued to apply under the 8-hour standard even after we revoked the 1-hour standard. (68 FR 32821).

On April 30, 2004 (69 FR 23951), we promulgated Phase I of the new implementation rule. In response to comments received on the proposal, we revised the implementation approach for major NSR under the 8-hour standard. Specifically, we determined that major NSR would be implemented in accordance with an area's 8-hour ozone nonattainment classification. For those areas that we classify moderate and above, major NSR is implemented under subpart 2. We also indicated that, when we revoke the 1-hour standard, a State is no longer required to retain a nonattainment major NSR program in its SIP based on the requirements that applied by virtue of the area's previous classification under the 1-hour standard. We further indicated that we would approve a request to remove these requirements from a State's SIP because

we determined based on section 110(1) of the Act that such changes will not interfere with any applicable requirements of the Act, including a State's ability to reach attainment of the 8-hour standard or reasonable further progress (RFP) (69 FR 23985). We noted that States will be required to implement a major NSR program based on the 8-hour classifications. We also emphasized that emission limitations and other requirements in major NSR permits issued under 1-hour major NSR programs will remain in effect even after we revoke the 1-hour standard (69 FR 23986).

### III. Today's Action on Reconsideration

#### A. Reconsideration Petitions

Following publication of the April 30, 2004 final rule, the Administrator received three petitions, pursuant to section 307(d)(7)(B) of the Act, requesting reconsideration of certain aspects of the final rule.<sup>1</sup> On June 29, 2004, Earthjustice submitted one of the three petitions that we received. This

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<sup>1</sup> Petitioners are: (1) Earthjustice on behalf of the American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy; (2) the National Petrochemical and Refiners Association and the National Association of Manufacturers; and (3) the American Petroleum Institute, American Chemistry Council, American Iron and Steel Institute, National Association of Manufacturers and the U.S. Chamber of Commerce. We are continuing to review the issues raised in the second and third of these petitions for reconsideration.

petition seeks reconsideration of certain elements of the Phase I Ozone Implementation Rule, including elements of the major NSR provisions. With respect to major NSR, Petitioners contend that the final rules are unlawful because the rules violate Section 110(1) and Section 172(e) of the Act by not requiring 8-hour ozone nonattainment areas to continue to apply major NSR requirements based on the area's 1-hour ozone nonattainment classification. Petitioners also allege that EPA acted unlawfully by stating that we will approve a State's request to remove 1-hour requirements from the SIP based on our finding that such a revision would not violate Section 110(1) for any State. Petitioners assert that these major NSR provisions and our rationale for them were added to the final action after the close of the public comment period. Thus, Petitioners claim, EPA failed to provide notice and opportunity for public comment concerning these provision as required under CAA Section 307(d)(5). On September 23, 2004, we granted reconsideration of three issues raised in the Earthjustice Petition. In an action dated February 3, 2005, we issued a Federal Register notice addressing two of those issues: (1) the provision that section 185 fees would no longer apply for a failure to attain the 1-hour standard once we revoke the 1-hour standard; and (2) the timing for determining what is an "applicable requirement." 70 FR 5593.

Today, we seek comment on the third issue raised in that petition, which related to elements of the major NSR program. Specifically, we request comment on: 1)whether we must interpret the Act to require States to continue major NSR requirements under the 8-hour standard based on an area's higher classification under the 1-hour standard; and 2)whether revising a State SIP to remove 1-hour major NSR requirements is consistent with Section 110(1) of the Act. As previously discussed, we proposed an approach concerning whether 1-hour nonattainment major NSR requirements must remain in the SIP after we revoke the 1-hour standard. (68 FR at 32821-22.) The public had an opportunity to comment on the approach we proposed, and in fact some commenters advocated replacing the 1-hour major NSR program with the 8-hour program. Nonetheless, we want Petitioners and others to have every opportunity to comment on our approach and to provide additional information that they believe to be relevant. For these reasons, we provide further explanation of our rationale for this action and request public comment on this approach. We will consider these comments and then make a final decision regarding the implementation of the NSR program under the 8-hour standard.

#### B. Schedule for Reconsideration and Status of Final Rules

We plan to take final action on our grant of reconsideration



by the end of May 2005. A State can only remove 1-hour NSR SIP provisions after we revoke the 1-hour standard. We plan to revoke the standard on June 15, 2005. Accordingly, no changes in 1-hour major NSR SIP programs could occur before June 15, 2005. The final rules concerning applicability of major NSR under the 8-hour standard remain in effect as promulgated until our final action on this reconsideration.

#### **IV. Rationale and Legal Basis**

##### **A. Overview**

It is a basic tenet of administrative law that expert agencies have discretion to interpret ambiguous statutory terms. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 387 (1984). We exercised this discretion in determining how to implement subpart 2 requirements for major NSR under the 8-hour standard, an issue that the Supreme Court has recognized is "ambiguous."<sup>2</sup>

In determining how to implement the provisions of subpart 2 for the major NSR program under the 8-hour standard, we considered the statutory requirements, Congressional intent as expressed in the CAA legislative history, the history of the NSR regulatory program, and our actions on 1-hour ozone Rate of

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<sup>2</sup> See Whitman, 531 U.S. at 484 ("The statute is in our view ambiguous concerning the manner in which Subpart 1 and Subpart 2 interact with regard to revised ozone standards, and we would defer to the EPA's reasonable resolution of that ambiguity.")

Progress (ROP) plans and attainment demonstrations in general as they relate to nonattainment major NSR programs. We discuss this information below.

Our review of this information, as well as public comments on the proposed rule, supports our conclusion that once we revoke the 1-hour standard, the Act does not require States to retain a nonattainment major NSR program in their SIPs based on the requirements that applied by virtue of the area's previous classification under the 1-hour standard. It also supports our conclusion that, based on section 110(1) of the Act, removing the 1-hour major NSR program does not interfere with any applicable requirements of the Act, including a State's ability to reach attainment of the 8-hour standard and RFP.

B. The Clean Air Act does not compel EPA to retain 1-hour major NSR requirements in implementing the 8-hour standard because major NSR is not a "control".

Section 172(e) applies when we relax a NAAQS. It specifies that we "shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." By its terms, it does not directly apply to requirements to implement the 8-hour standard, because we strengthened the ozone NAAQS when we enacted the 8-hour

standard. Nonetheless, we view this provision as an expression of Congressional intent that States may not remove control measures in areas which are not attaining a NAAQS when EPA revises that standard to make it more stringent, as is the case with the 8-hour standard. See 68 FR 32819. Accordingly, we required States to retain certain requirements associated with the 1-hour ozone nonattainment classification in implementing the 8-hour standard. See generally 69 FR 23951.

Notwithstanding the requirement to retain certain 1-hour control measures, we determined that Section 172(e) and our interpretation of Congressional intent does not mandate that States retain 1-hour major NSR requirements under the 8-hour standard, because the major NSR program does not impose emissions "controls" that reduce a nonattainment area's emissions below that area's baseline year inventory. In this respect, major NSR is not a "control" within the meaning of Section 172(e). Thus, we concluded that because major NSR programs based on 1-hour classifications would not contribute emissions reductions below baseline levels, those provisions are not "controls" that need to be preserved in implementing the 8-hour standard.

The term "controls" as used in Section 172(e) is ambiguous. In determining whether the reference to "controls" in Section 172(e) covers 1-hour NSR requirements, and thus whether we should

interpret the Act as requiring such controls to remain effective after revocation of the 1-hour standard, we looked first to the CAA statutory language and structure. We reasoned that "[t]he role of the NSR permitting program as a growth measure, rather than a control measure, is evidenced in the structure of the Act, which delineates nonattainment NSR and control measures as separate SIP requirements," citing, among other things, Section 110(a)(2)(A) and 110(a)(2)(C). (69 FR at 23986). Similarly, Section 172(c), which identifies the requirements for nonattainment plans, lists requirements for implementation of control measures separately from the provision requiring permits for new and modified major stationary sources. Compare Sections 172(c)(1) and (c)(6) (referring to control measures) with Section 172(c)(5) (referring to permits for new and modified major stationary sources).

Second, to resolve the ambiguity over whether the term "controls" in section 172(e) covers 1-hour NSR requirements, we further looked to Congress' purpose in creating the major NSR program. The 1970 statute did not contain any provisions concerning permitting of new sources, either in attainment or nonattainment areas. The statute set 1975 as the deadline to meet the NAQQS in most regions, with some extensions until 1977. By the time of the 1977 Amendments, many areas had missed their

attainment deadlines, and it became apparent that, despite significant progress, SIPs were inadequate to achieve the NAAQS in many areas of the country.

In 1977 Congress considered whether new source growth could be allowed in areas not attaining the NAAQS.

A major weakness in implementation of the 1970 Act has been the failure to assess the impact of emissions from new sources of pollution on State plans to attain air quality standards by statutory deadlines. States have permitted growth on the assumption that a deadline was sufficiently distant so that future emissions reductions could be made to compensate for the initial increases. It can now be seen that these assumptions were wrong. Some mechanism is needed to assure that before new or expanded facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards.

One mechanism is a case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard. Such a review requires matching reductions from existing sources against emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline. This is the mechanism adopted by the Committee as a condition for approval of an implementation plan revision under section 110(a)(3) and for extensions of the oxidant and carbon monoxide attainment deadlines beyond 1982. Sen. Rep. 95-127 at 55 (May 10, 1977).

Congress thus recognized the need for a balance between the goals of attaining air quality standards and providing for new economic growth. As part of the 1977 Amendments, Congress amended the Act to, among other things, establish a statutory approach to permit growth in polluted areas, while requiring

attainment of the NAAQS by specific deadlines.<sup>3</sup> This approach established the basic SIP process and requirements for attaining the NAAQS.

The major NSR program's purpose "is to permit States to allow continued growth or expansion in nonattainment areas, so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act." See H.R. Rpt. 95-294 at 210 (May 12, 1977). Section 172(a)(2) of the Act requires attainment as expeditiously as practicable considering the availability and feasibility of control measures and Section 172(c)(1) and (c)(6) require implementation of all reasonably available control measures as expeditiously as practicable to provide for attainment of the NAAQS by the area's attainment date. Conversely, Section 173(a)(1)(A) requires only that growth due to proposed sources, when considered together with the other plan provisions required under Section 172, be sufficient to ensure RFP toward attainment. Thus, unlike the control measures required by Section 172(c)(1) and (c)(6), major NSR is not a measure to reduce emissions to assure attainment; nor did Congress identify the program as a control measure to help areas achieve attainment "as expeditiously as practicable."

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<sup>3</sup> Sections 107(d) and 172 of the Act (42 U.S.C. 7407(d) and 7502; Sections 129(a) and (c) of the 1977 Amendments, Pub. L. No. 95-95.

Rather, Congress intended that the effectiveness of major NSR in minimizing the impact of increased emissions should be considered together with the State's other SIP measures to assure, consistent with Section 172(a)(2), that emissions from new sources will be consistent with RFP. Our interpretation is supported by the legislative record wherein Congress stated that

In allowing new sources to locate, and existing sources to expand, in presently unhealthy air areas, the committee realizes that some worsening of air quality or delay in actual attainment of the national ambient air standards will result. This is inevitable, as a result the committee had to accept as a consequence of allowing additional economic growth in these area. Id. at 214-215.

Accordingly, based on our analysis of the statutory language and structure, and Congress' purpose in creating the major NSR as a measure to mitigate emissions growth rather than a measure to reduce existing emissions levels, we conclude that Congress did not mean to include major NSR within the "controls" that are required to be maintained in the SIP under our antibacksliding approach and Section 172(e).

We note that recent case law upheld the Agency's approach of looking to Section 110 to determine the meaning of a similar phrase, "measures with respect to the control," of pollutants in Section 175A of the Act concerning maintenance plans.<sup>4</sup> Greenbaum

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<sup>4</sup> Section 175A requires that when an area is redesignated from nonattainment to attainment, it must submit a plan to provide for maintenance of the Standard. The plan must include

v. U.S. EPA, 370 F.3d 527, 536-37 (7th Cir. 2004). In reviewing EPA's determination that the phrase did not include nonattainment major NSR, the court found the phrase ambiguous, and stated:

It was entirely permissible, and indeed logical, for the EPA to look to § 110 to determine the meaning of the word "measure" in § 175A as § 110 lists the provisions required to be included in a nonattainment SIP.

Likewise, the EPA's argument that the reference to the Part D NSR program in subparagraph C of § 110 [110(a)(2)(C)] would be surplusage if it were among the control measures mentioned in subparagraph A of § 110 [110(a)(2)(A)] is reasonable.

The Court then deferred to EPA's determination that the phrase did not include nonattainment major NSR, and thus that major NSR provisions need not be retained in contingency plans. Thus, although major NSR, when triggered, results in the requirement to impose LAER and the requirement to obtain offsetting emissions, neither of these requirements are considered a "measure with respect to the control" of the relevant NAAQS pollutant within the meaning of Section 175A. That is, it is not relevant for determining which former nonattainment SIP provisions States must include in contingency provisions. We believe this decision supports our determination that a 1-hour major NSR program is not a "control" measure within the meaning of Section 172(e).

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contingency provisions that, in the event of a violation of the Standard, would require the State to implement "measures with respect to the control" of the Standard pollutant that were in the SIP prior to redesignation.



Accordingly, we find that the Act does not mandate that States retain the program under the antibacksliding approach implemented in transitioning from the 1-hour to the 8-hour standard.

Petitioners cite EPA's past characterization of major NSR in a Supreme Court brief and a Federal Register notice as a "pollution-control measure" and "pollution control technology program." Pet. at 5 (June 29, 2004)(quoting EPA Opening Merits Brief in Chevron, U.S.A. v. NRDC, S.Ct. 82-1005 (Aug. 31, 1983), 1982 Lexis U.S. Briefs 1005, at n.5; accord, 67 FR 80187(Dec. 31 2002)). These citations are somewhat misleading, however, because petitioners isolate single phrases and ignore the broader context in which we wrote the words. The Supreme Court brief addresses whether EPA reasonably used a plantwide definition of "source" in the NSR program, and the quoted phrase occurs in the context of comparing the NSR and New Source Performance Standards (NSPS) programs. See Chevron U.S.A., Inc. v. NRDC, 1982 LEXIS Briefs 1005 at n.55 (Aug. 31, 1983). The Federal Register notice provision cited by Petitioners makes the statement in a background section generally describing the NSR program as a combination of an air quality planning and control technology program. In that same paragraph of the notice, we also stated that one of the program's purposes is "... to maximize opportunities for economic development consistent with the

preservation of clean air resources." Moreover, this alleged characterization has no persuasive value in interpreting the meaning of "controls" in Section 172(e) nor the appropriateness of interpreting the Act as a whole with respect to backsliding because the cited brief and Federal Register notice do not address this issue, nor even touch on the subject of antibacksliding generally.

Petitioners also reference a 1990 House Report describing the Subpart 2 classification system as a "graduated control program". Pet. at 7. That Report states:

Also included in the graduated control requirements are increasing offset ratios that require a greater level of pollution reductions from other sources in the nonattainment area to offset increases in pollution from new sources or modifications. This program is intended to allow economic growth and the development of new pollution sources and modifications to continue in seriously polluted areas, while assuring that emissions are actually reduced. H.R. Comm. on Energy and Commerce, The Clean Air Act Amendments of 1990-Hearings of H.R. 3030, 101st Cong. 234 (May 17, 1990)

Read out of context, this legislative history could be interpreted to imply that Congress intended the higher offset requirements in subpart 2 to act as "controls." However, this language must be read in context of the statutory framework.

First, unlike control measures for which emissions reductions can be quantified and relied on in a modeling demonstration to show how the measure helps an area reach

attainment, the benefits of offsets are uncertain. This is because States generally do not know in advance when and if any major stationary source will become subject to the major NSR offsetting requirements. Accordingly, as discussed further below, States do not use the higher offset ratios as a SIP control strategy within their attainment plans. But even if a State could project the number of sources that would trigger the offset requirement, the State, still could not necessarily rely on the higher emissions offset ratios to reduce emissions in the area. This is because, in Section 173(c)(1), Congress allows a major stationary source to obtain offsets from other nonattainment areas. Such an area may be located in another State. In this context, offsets serve as a valuable tool in reducing regional pollutant transport, but may achieve no actual reductions in the area where the new emissions are locating. Accordingly, it would be inappropriate for a State to expressly rely on offsets as a State-imposed regulatory measure or "control" to achieve a defined quantity of emissions reductions from sources within the State for the purpose of reducing the existing emissions inventory. Based on this information, and because the legislative history does not address the issue of Congress's intent in using the term "controls" in Section 172(e), or the subject of antibacksliding generally, we conclude that it

lacks persuasive value in interpreting the term "controls" in Section 172(e) or elsewhere in the Act.

Petitioners further claim that CAA Sections 173(d) and 173(a)(5), referring to lowest achievable emission reduction (LAER) requirements as a control technology and control technique, indicate NSR is a control measure. As we discuss in this proposed rule, the statute, our regulations, and our guidance have established NSR as a growth measure for SIP planning purposes. LAER is not a control measure, but instead is an emission limitation based on application of a particular control technology. Control measures such as reasonably available control technology (RACT), transportation control measures (TCM), and inspection and maintenance programs (I/M) reduce base year emissions to assure RFP and meet attainment. The LAER's purpose is to minimize the amount of emissions increase resulting from new or modified major stationary sources, not reduce emissions below the base year inventory. CAA Sections 173(d) and 173(a)(5) instead contain specific requirements related to LAER. CAA Section 173(d) requires States to report information on LAER to the RACT/BACT/LAER Clearinghouse.<sup>5</sup> CAA

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<sup>5</sup> In framing 173(d), Congress did not identify LAER as a control obligation. Instead, Congress clearly stated the purpose of including 173(d) was to make sure that the LAER control technology information is widely available. See The Clean Air Act Amendments of 1990-Hearings of H.R. 3030, 101st Cong. at 226.

Section 173(a)(5) requires consideration of LAER in the alternative sites analysis.

While petitioners present a possible interpretation of the term "controls" as used by Congress in Section 172(e), we do not believe that the Statute compels this interpretation. Moreover, to accept the Petitioners' interpretation would essentially define "controls" in a way that would require States to retain all requirements in a SIP upon relaxation of the standard. If Congress meant to require States to retain all requirements, Congress would have stated so expressly. Instead, by using only the term "controls," Congress implied an intent that some requirements under the old standard would no longer apply under the new standard. We think it is reasonable to interpret the term "controls" to exclude major NSR, whose purpose is to ensure that emissions growth does not interfere with attainment, and for which States can not reliably estimate the benefits of mitigating emissions increases for SIP planning purposes.

C. No State's removal of 1-hour major NSR requirements from the SIP will interfere with any applicable requirement under the Act within the meaning of Section 110(1)

Section 110(1) provides us the legal authority to approve revisions to SIPs when we determine that such revisions will not "interfere with any applicable requirement concerning attainment

and reasonable further progress (as defined in section 171), or any other applicable requirement of the Act." Petitioners suggest that Section 110(1) limits the Administrator's ability to approve any change in a State SIP if that change would relax requirements previously contained in the SIP. We disagree. Rather, we interpret Section 110(1) to allow such changes if the revision is consistent with reasonable further progress, and will not interfere either with the area's ability to achieve attainment or with any other requirement of the Act.

To determine whether a change in major NSR requirements could satisfy these criteria, we first reviewed the statutory role of major NSR. As discussed above, Congress designed the major NSR program to mitigate emission increases from economic growth - not as a program to generate emissions reductions to bring an area into attainment. Congress distinguished those "reasonably available control measures" required to bring an area into attainment "as expeditiously as practicable" as specified in Section 172(c)(1) from the requirements of the major NSR program specified in Section 172(c)(4) and (5). Moreover, Congress recognized in allowing for growth in nonattainment areas, that some worsening of air quality may be inevitable. Accordingly, States do not rely on major NSR to achieve emissions reductions and reach attainment as expeditiously as practicable and thus a

change in the program will not interfere with any applicable requirement concerning attainment and reasonable further progress.

We also reviewed the role major NSR plays in State attainment planning. While we disagree with Petitioners' assertion that the Section 110(1) analysis requires us to analyze changes relative to the 1-hour standard (after we revoke that standard), and we are not granting reconsideration on that issue, we nonetheless looked at the effect of removing the major NSR requirements on the State's existing 1-hour attainment plans to determine what effect it may have for future planning under the 8-hour standard.

Before 1990, Congress provided States with two options for managing the impact of economic growth on emissions. A State could either provide a case-by-case review of each new or modified major source and require such source to obtain offsetting emissions, or the State could implement a waiver provision which allowed the State to develop an alternative to the case-by-case emissions offset requirement. This alternative program became known as the "growth allowance" approach. In 1990, Congress invalidated some of the existing growth allowances and shifted the emphasis for managing growth from using growth allowances to using the case-by-case offset approach.

Nonetheless, we still interpreted the inventory and SIP demonstration requirements in the Act to require States to continue to account for future growth in their demonstrations. See 57 FR 13554, 13567. In this way, State SIPs analyze the impact of growth on emissions in two overlapping ways: 1)by establishing a growth projection in the attainment demonstration, and 2)by requiring major sources to comply with the major NSR requirements.

In general, States use information from the Bureau of Economic Analysis (BEA) to derive growth factors which are then applied to different industrial categories to project emissions growth within the nonattainment area. Some States project growth based on industry data that is specific to their jurisdiction, rather than using national BEA data to project the source category increases. A few States project growth based on NOx emissions caps imposed by SIP-approved regulations (e.g. NOx-SIP call). Finally, a few States project no point source growth based on SIP-approved rules that limit VOC and NOx emissions in the area. Regardless of which process is used, each State arrives at a specific tonnage of emissions that represents the expected increase in emissions due to economic growth in the State. This growth projection represents increases in emissions that come from a variety of different activities such as major



and minor modifications and increases in utilization at existing sources. The SIPs then provide sufficient emissions reductions to bring the areas into attainment and provide reasonable further progress even accounting for this projected growth.

The next critical question in determining what effect a change in the major NSR requirements might have is whether States adjust this growth projection based on applicability of the major NSR program. A survey of current nonattainment areas shows that in general States do not discount the growth projection based on an assumption of the quantity of emissions increases that may be "offset." In fact, we discourage States from including offsets as a source of emissions reductions in the attainment model because of the difficulties in accurately predicting the number of sources that will trigger offset reductions and the number of offsets actually achieved. Moreover, the method used to derive the growth projection allows no consideration of the major stationary source thresholds that apply under the 1-hour ozone classification. Finally, we are aware of only one district in California that discounts the growth projection assuming a LAER level of control in projecting emissions. However, this particular district also has a very stringent SIP-approved nonattainment major NSR rule in which LAER applies to all sources with potential to emit (PTE) greater than 1 lb/day and offsets

are required for all sources with PTE greater than 4 tpy VOC or NOx. A lower classification under the 8-hour standard than under the 1-hour standard thus would not change the number of sources in this district subject to LAER or offsets. Therefore, this district similarly did not rely on the major stationary source thresholds or the offset ratios that applied under the 1-hour classification as opposed to those that would apply under the 8-hour standard to assure RFP or attainment of the 1-hour standard.<sup>6</sup>

Once a State computes the growth projection, these emissions are added to the base year emissions inventory and used to project growth for rate of progress plan purposes, and to project growth through the attainment year in the attainment demonstration model. In the attainment demonstration model, States must demonstrate that other emissions reduction programs in the SIP will allow the area to reduce emissions over time to achieve attainment by the attainment date despite the economic growth. Furthermore, the State must also demonstrate that the phasing in of emission reductions over time is sufficient to

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<sup>6</sup> We are referring to South Coast Air Quality Management District. There are several other State and local agencies, including some in California, in which the classification under the 8-hour standard is lower than that under the 1-hour standard. We are not aware of any of these agencies relying on the major stationary source thresholds or the offset ratios under the 1-hour classification to assure RFP or attain the 1-hour standard.

achieve reasonable further progress toward attainment. This effectively means that whether or not major NSR applies to a given activity that increases emissions, the area is projected to reach attainment based on other control measures in the SIP.

This information shows that States have not directly relied on the major NSR program as a control measure to achieve reductions and move the area toward attainment. For the 8-hour standard, States will generally account for growth in the same manner to show attainment of the 8-hour standard. The only change may be that some States rely on EPA's Economic Growth Analysis System rather than BEA information, but these two systems are fundamentally similar in that they rely on economic forecasts to project growth in emissions. Accordingly, EPA concludes that the removal of 1-hour major NSR requirements from the SIP will not interfere with reasonable further progress or attainment in any area because all States' attainment demonstrations will account for emissions increases related to growth within the attainment demonstration, and these projections will not differ based upon the major NSR program applicable to the area under its ozone classification.

Petitioners argue that if this logic is accepted, " a state could pluck out any other requirement (including requirements such as enhanced I/M or stage II)...and argue that the

requirement is dispensable in light of the area's attainment and RFP plans." Pet. at 12. We disagree that our logic as described here would lead to the same conclusion for all programs, because States rely on these other programs to generate emissions reductions in the modeling demonstration. Nonetheless, we agree with Petitioners that Congress "prescribed specific program elements like NSR" and each State must show how these statutory requirements are being met through their SIP programs. Id.

States satisfy this requirement by having the authority to issue permits in 8-hour nonattainment areas consistent with the requirements of major NSR for the 8-hour standard. Major NSR plays a role in assuring that growth from major stationary sources occurs consistent with States' plans for meeting reasonable further progress and reaching attainment. In 1990, Congress recognized that some States were not accurately predicting the growth within their attainment demonstrations. Accordingly, in Subpart 2 of the Act, Congress specified that areas with more severe ozone nonattainment problems should implement higher offset ratios and lower major stationary source thresholds. Likewise, we followed the same approach for the 8-hour standard by basing the major NSR requirements on the severity of the area's 8-hour ozone nonattainment problem. As a policy matter, we believe that it is appropriate to look at

areas' present day air quality in determining what major NSR program requirements are necessary to assure future air quality improvements, because an area's ability to accommodate economic growth is related to its current air quality conditions. An area's classification under the 8-hour standard is a more accurate reflection of current day air quality than the classification we assigned under a different standard as far back as the early 1990's.

Together, the growth projection methods used in preparing attainment demonstrations and the 8-hour major NSR program requirements provide overlapping assurance that removing the 1-hour major NSR program from the SIP, will not "interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of the Act."

#### **D. Request for Comment**

For the reasons discussed in this section, we continue to assert that at the time we revoke the 1-hour standard, a State is no longer required to retain a nonattainment major NSR program in its SIP based on the requirements that applied by virtue of the area's previous classification under the 1-hour standard. Instead, States must have authority to issue major NSR permits consistent with the requirements that are associated with the

area's designation and classification under the 8-hour standard. For the reasons discussed in this section, we also continue to assert, based on section 110(1) of the Act, that removing the 1-hour nonattainment major NSR program will not interfere with any State's ability to achieve attainment of the 8-hour standard and will be consistent with RFP.

We request comment on our determination that the Act does not require States to apply major NSR requirements under the 8-hour standard based on an area's higher classification under the 1-hour standard after we revoke the 1-hour standard, and on our interpretation that the term "control" as used in Section 172(e) of the Act does not include major NSR requirements. We also request comment on our conclusion that a State's removal of 1-hour major NSR programs from its SIP will not interfere with any applicable requirements of the Act including attainment and RFP. We specifically request comment on our discussion regarding State and local agency emission projections used for RFP and attainment, including whether the statements we have made regarding those emission projections are accurate. We also request specific information on any instance in which a State or local agency relied on major NSR as a control measure to reduce overall base year emissions in a rate of progress plan or attainment demonstration.

## **V. Statutory and Executive Order Reviews**

On April 30, 2004, we took final action on key elements of the program to implement the 8-hour NAAQS, including applicability of the nonattainment major NSR programs under the 8-hour ozone NAAQS. In that action, we did not revise the nonattainment major NSR regulations. With today's action we are also proposing no changes to the nonattainment major NSR rules. However, we are seeking additional comments on some of the provisions finalized in the April 2004 Federal Register notice (69 FR 23951).

### **A. Executive Order 12866—Regulatory Planning and Review**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere

with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this proposed rule is not a "significant regulatory action." Today's reconsideration notice proposes to retain the position we adopted in the final Phase I rule.

#### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. This rule interprets the requirements to develop State or tribal implementation plans to satisfy the statutory requirements for major NSR. We are not imposing any new paperwork requirements. However, OMB previously approved the information collection requirements contained in the existing regulations (40 CFR Parts 51 and 52) under the provisions of the Paperwork Reduction Act. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division, U.S. Environmental Protection



Agency (2822T), 1200 Pennsylvania Ave., NW, Washington, DC 20460, or by calling (202) 566-1672. Please refer to OMB control number 2060-0003, EPA ICR number 1230.17 when making your request.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA), as amended by the Small

Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5  
USC 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (See 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small

entities. This proposed rule will not impose any requirements on small entities. The Phase 1 Rule addressed key elements of the program to implement the 8-hour ozone NAAQS, including the obligations under the major NSR program. This reconsideration notice addresses the statutory obligations for States and Tribes to implement the major NSR program for the 8-hour ozone NAAQS. For the same reasons that we concluded that the Phase 1 Rule will not have a significant economic impact on a substantial number of small entities, we conclude that our further action on aspects of that rule also not have a significant impact on small entities.

#### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt

the least costly, most cost effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost effective or least burdensome alternative if the Administrator publishes with the final rule an explanation as to why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan.

The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

In promulgating the Phase 1 Rule we determined that this proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. Therefore, we concluded that the Phase 1 Rule is not

subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons stated when we promulgated the Phase I Rule, we conclude that the issues addressed in this notice on reconsideration of an aspect of that rule is not subject to the UMRA.

EPA also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments, including tribal governments.

#### E. Executive Order 13132-Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the

various levels of government, as specified in Executive Order 13132. This rule specifies the statutory obligations of States and Tribes in implementing the major NSR program in 8-hour ozone nonattainment areas. The Act establishes the scheme whereby States take the lead in developing plans for EPA to approve into the state plan for implementing the major NSR program. This rule would not modify the relationship of the States and EPA for purposes of developing programs to implement major NSR. Thus, Executive Order 13132 does not apply to this rule. Nonetheless, in the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This proposed rule does not have "tribal implications," as specified in Executive Order 13175. The purpose of this proposed rule is to seek comment on EPA's

reconsideration of an aspect of the Phase 1 8-hour ozone rule specifying the statutory obligations of States and Tribes in implementing the major NSR program in 8-hour ozone nonattainment areas. The tribal authority rule (TAR) gives Tribes the opportunity to develop and implement Act programs such as the major NSR program, but it leaves to the discretion of the Tribe whether to develop these programs and which programs, or appropriate elements of a program, they will adopt. For the same reasons that we stated in the Phase 1 Rule, we conclude that this proposed rule does not have Tribal implications as defined by Executive Order 13175. To date, no Tribe has chosen to implement a major NSR program. Moreover, this rule does not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks

Executive Order 13045: "Protection of Children from Environmental health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect

on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule relates to reconsideration of one aspect of the Phase 1 Rule to implement the 8-hour ozone NAAQS. For the same reasons stated with respect to the Phase 1 Rule, we do not believe the Rule, or this reconsideration notice, is subject to Executive Order 13045. The Phase 1 Rule implements a previously promulgated health based Federal standard, the 8-hour ozone NAAQS. Nonetheless, we have evaluated the environmental health or safety effects of the 8-hour ozone NAAQS on children. The results of this evaluation are contained in 40 CFR Part 50, National Ambient Air Quality Standards for Ozone, Final Rule (62 FR 38855-38896; specifically, 62 FR 38855, 62 FR 38860 and 62 FR 38865).

#### H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a



significant adverse effect on the supply, distribution, or use of energy.

Information on the methodology and data regarding the assessment of potential energy impacts in implementing programs under the 8-hour ozone NAAQS is found in Chapter 6 of U.S. EPA 2003, *Cost, Emission Reduction, Energy, and Economic Impact Assessment of the Proposed Rule Establishing the Implementation Framework for the 8-hour, 0.08 ppm Ozone National Ambient Air Quality Standard*, prepared by the Innovative Strategies and Economics Group, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. April 24, 2003.

#### I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical.

Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus

standards.

Today's proposed rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionate high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations.

The EPA concluded that the Phase 1 Rule should not raise any environmental justice issues; for the same reasons, the issues raised in this reconsideration notice should not raise any environmental justice issues. The health and environmental risks associated with ozone were considered in the establishment of the 8-hour, 0.08 ppm ozone NAAQS. The level is designed to be protective with an adequate margin of safety. The proposed rule provides a framework for improving environmental quality and reducing health risks for areas that may be designated nonattainment.

## **VI. Statutory Authority**

The statutory authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the Act as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This notice is also subject to section 307(d) of the Act (42 U.S.C. 7407(d)).

### **List of Subjects in 40 CFR Parts 51**

Environmental protection, Administrative practice and procedure, Air pollution control, LAER, Nitrogen oxides, Ozone, Volatile Organic Compounds, 8-hr Ozone NAAQS.

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Dated:

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Jeffrey Holmstead, Assistant Administrator

